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DIVISION II
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STATE OF WASHINGTON
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No. 44300-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

WENDY L. TATE,

Respondent,

and

GREGORY E. TATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JAMES ORLANDO

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding the husband "committed domestic violence toward the wife and children" and "represents a credible threat to the physical safety" of the wife based on the reasons in its Decision Letter and Order for Protection. FF 2.14, CP 141-145,178, 180, 187, 381-382.

2. The trial court erred in finding that the wife "may request modification of visitation" in the order for protection. CP 144.

3. The trial court erred in finding that "emotional and physical abuse inflicted by Husband upon the wife and the children" and that he "represents a credible threat to the physical safety" of the wife based on the reasons its Decision Letter and Amended Restraining Order. FF 2.13, CP 177, 180, 245-248, 381-382.

4. The trial court erred in finding that "Upon Dr. Huddlestone's belief that the counseling has been completed, father can seek a review hearing for increased residential time." PP VI.3, CP 156, 382.

5. The trial court erred finding a "physical or a pattern of emotional abuse of the children" based on the reasons its Decision Letter and adopted GAL reports. PP 2.1, CP 156, 381.

6. The trial court erred finding "a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault which causes grievous bodily harm or the fear of such harm," based on the reasons its Decision

Letter and adopted GAL reports. PP 2.1, CP 156, 381.

7. The trial court erred finding "neglect or substantial nonperformance of parenting functions," based on the reasons its Decision Letter and adopted GAL reports. PP 2.2, CP 156, 381.

8. The trial court erred finding the "absence or substantial impairment of emotional times between the parent and children, based on the reasons its Decision Letter and adopted GAL reports. PP 2.2, CP 156, 381.

9. The trial court erred finding the "abusive use of conflict which creates the danger of serious damage to the children's psychological development" based on the reasons its Decision Letter and adopted GAL reports. PP 2.2, CP 151-157, 381.

10. The trial court erred in the findings in the reports of the GAL incorporated in the parenting plan. CP 156.

11. The trial court erred in finding that "enforcement or collection action on the alleged promissory note to John Tate is barred by the statute of limitations." FF 2.21, CP 179, 384-385.

12. The trial court erred in finding that "the community has held an interest in Tate Lake Rentals, LLC; Tate Farms, LLC; and Tate & Sons, LLC, including any and all real property and personal property owned by said LLCs" for the reasons in its Decision Letter. FF 2.8, CP 175, 382.

13. The trial court erred in finding below and as stated in its Decision

Letter:

John Tate, father of Greg Tate who is not a party to this action, made inconsistent statements and behaviors over the years which supported a finding of community interest in Tate Lake, LLC, Tate Farms, LLC and Tate & Sons, LLC. He created documents that show his intent in forming a partnership with Greg and Wendy and he treated them both as partners or shareholders of said LLCs. FF 2.12, CP 179, 382.

14. The trial court erred in finding below and as stated in its Decision Letter:

Greg Tate claims the parties' have no community interest in community interest in Tate Lake, LLC, Tate Farms, LLC and Tate & Sons, LLC, and he is therefore estopped from asserting any interest in these entities as may be established by pending litigation. FF 2.12, CP 179, 188, 384-385.

15. The trial court erred in awarding the wife "any and all interest that either party holds" in the LLCs and their property as established in the pending litigation, based on the reasons in its Decision Letter. CP 183-184, 382, 384-385.

16. The trial court erred in finding that "the community holds an interest valued at $182,000" in the husband's Lake Sammamish condominium and awarding $91,000 of this amount to the wife. FF 2.8, CP 175, 184, 382.

17. The trial court erred in finding that the 2000 Correct Craft ski boat and 2000 Nautique DHM boat trailer were community property and awarding them to the wife. FF 2.8, CP 176, 185, 382.

18. The trial court erred in finding that the 1998 Liberty mobile home

was community property and awarding them to the wife. FF 2.8, CP 176, 185, 382.

19. The trial court erred in failing to characterize the Boeing VIP loans and assigning them to the husband. CP 185.

20. The trial court erred in considering marital misconduct in making its property award. CP 381-384.

21. The trial court erred in finding that the wife "has the need for spousal maintenance" of $2000 per month for 48 months as she "has been a stay-at-home mother" [and the] suspension of wife's outside employment and career efforts has resulted in her decreased earning potential" and the husband "has the ability to provide financial support," based on the reasons in its Decision Letter. FF 2.12, CP 177, 186, 382-383.

22. The trial court erred finding that the wife "has the need" and the husband "has been intransigent" and "is capable" of paying $20,000 of the wife's attorney's fees based on the reasons in its Decision Letter. FF 2.15, CP 178, 180, 187, 383.

23. The trial court erred in entering its October 5, 2012, Decision Letter. FF 2.12, CP 179, 187, 381-383.

24. The trial court erred in entering its October 8, 2012, Email Decision. FF 2.12, CP 179, 187, 384-385.

25. The trial court erred entering in its Order Denying Motion for Reconsideration on November 30, 2012. CP 222.

26. The trial court erred in entering its Order Denying Motion for Reconsideration on January 11, 2013. CP 449-450.

27. The trial court erred in finding the husband shall elect the 100% joint and survivor annuity option for his Boeing Pension Value Plan. CP 266.

28. The trial court erred in finding that the husband shall elect the 100% joint and survivor annuity option for his Boeing Employee Retirement Plan. CP 258.

29. The trial court erred in entering its Order for Protection. CP 141-145, 180, 187.

30. The trial court erred in entering its Amended Restraining Order. CP 180, 187, 245-248.

31. The trial court erred in entering its Parenting Plan. FF 2.19, CP 150-157, 187.

32. The trial court erred in entering its Findings of Fact and Conclusions of Law. CP 173-180.

33. The trial court erred in entering its Decree of Dissolution. CP 181-188.

II. STATEMENT OF ISSUES

1. Did the trial court err in issuing a protection order that imposed extensive restraints on Greg and allowed Wendy to modify his visitation when she had agreed to dismiss her petition for such an order in 2011 and she did not request on at trial?

2. Did the trial court err in issuing restraining orders against Greg when Wendy testified only about his financial control and emotional abuse during the marriage and he did nothing threatening after the separation?

3. Did the trial court err in continuing to limit Greg's time with his kids to just one day every other week, until the children's counselor, who refused to act as an "advocate or an impartial," states her belief that he has completed reconciliation counseling thereby allowing him to seek a review hearing to increase his time?

4. Did the trial court err in making a restrictive parenting plan under RCW 26.09.191, when its findings conflict with or do not support the limiting factors?

5. Did the trial court err in ruling that any action on the promissory note to the Greg's father, who was not a party, is barred by the statute of limitations?

6. Did the trial court err in finding a community interest in the Greg's father's LLCs and property and awarding any interest that either party

holds in them to Wendy?

7. Did the trial court err in ruling that Greg is estopped from claiming an interest in the LLCs and property that his father bought and funded, merely because he took the position that he and Wendy did not have an interest in them?

8. Did the trial court err in characterizing $182,000 of the $240,000 value of the condominium that Greg owned before marriage as community property and awarding Wendy $91,000 of this amount?

9. Greg traded a ski boat he owned before marriage until he acquired the 2000 Correct Craft ski boat and trailer. Did the trial court err in characterizing these assets as community and awarding them to Wendy?

10. Did the trial court err in characterizing as community and awarding to Wendy the 1998 Liberty mobile home, which Greg acquired with proceeds of property acquired prior to marriage?

11. Did the trial court err in allocating both Boeing VIP loans to Greg, and awarding Wendy the 2004 Edge travel trailer, which was paid off with one of the loans?

12. Did the trial court err in awarding Wendy $2,000 per month maintenance for 48 months when she was able to find appropriate employment, but chose to go to graduate school instead, while Greg was unable to pay and meet his own needs?

13. Was it an error to award Wendy $20,000 in fees based on the parties' relative intransigence and economic positions after dissolution?

III. STATEMENT OF THE CASE

A. Introduction

Greg and Wendy Tate built their relationship around their love of waterskiing. RP 9/21 at 40, Ex. 14 at 4. When they met, Greg had achieved national water skiing ranking and Wendy was selling waterskiing boats. RP 9/19 at 93, 9/21 at 54-56. Before they married, Greg had persuaded his father to purchase land and pay to develop a private water ski lake so Greg could enjoy unlimited waterskiing with his friends. RP 9/21 at 55. In exchange, he would rent and maintain the property so his father could recoup the funds used for the purchase. RP 9/21 at, RP 9/26 at 43, Ex. 107. They called the property "Tate Lake." RP 9/21 at 55.

Greg and Wendy married in February 1996 and had three children, Dax, Boone and Samena, who were 16, 14, and eight at the time of trial. RP 9/19, 72, 84-88, 94. During the summers, the family was routinely at the lake from Thursday to Sunday and often for longer periods of time. RP 9/19 at 75, 87-88, 145, 9/21 at 60; 9/25 at 71-72, 178-179, 9/26 at 51-52.

Greg and Wendy eventually separated, when she had him served with an ex parte protection order in August 2011. CP 282.

B. Greg

Greg began working at Boeing after high school. RP 9/21 at 52, 54. In 1991, he convinced his father, John Tate, along with another couple, the Bonneys, to purchase a property in eastern Washington to build a water ski lake. RP 9/21 at 56-57, 9/26 at 43. Greg did not contribute to the purchase price or development costs, however, he was listed on the deed along with his parents and the Bonneys. RP 9/21 at 57-58; 9/26 at 119-126; Ex. 106.

C. Wendy

When Wendy met Greg she had a college decree and had worked for seven years selling waterskiing boats. RP 9/19 at 80, 93; 148; 9/21 at 18-19; Ex. 20. After marriage, she worked for several years as a para-educator. RP 9/19 at 93-95, Ex. 14 at 4, 20. From 2004 to 2011, Wendy worked for her mother, a successful real estate broker, as she had obtained her realtor's license in 1991. RP 9/18 at 191-191, 9/19 at 93-94, 9/21 at 18-19, Ex. 1, 20, 67.

D. Family Home at Lake Tapps

In 1997, Greg and Wendy purchased their home on Lake Tapps. RP 9/19 at 85, 97, 9/26 at 9. They also borrowed $143,000 from John Tate and signed a Promissory Note to him. RP 9/24 at 104, Ex. 8.

E. Buy Out of the Bonneys' Interest

In 1999, John Tate discussed with Greg and Wendy possibly buying out the Bonneys and, if so, what their responsibilities would be. RP 9/24 at 42-43. In October 1999 he wrote them this "means that you are going to have to be available most of the time to deal with renters and will need to spend a lot of time at the lake" and - concerned they wouldn't follow through - said, "I know you said you would but I wonder how long that would last," before he invests his money, which he estimated he would need 16 years to make back, without interest. Ex. 107.

A few days later, John Tate, along with Greg and Wendy, met with his financial advisor, who suggested forming a family limited partnership to operate the lake rental business, without resolving the question of "Which entity owns the assets?" RP 9/24 at 42-45, Ex. 49.

In 2000 John bought out the Bonneys' interest in Tate Lake. RP 9/24 at 17-21, 9/26 at 97-98. Wendy and her mother, Grace, a realtor, drafted the paperwork, had Grace's preferred escrow company close, and the deed listed John, Maxine, Greg and Wendy. RP 9/18 at 169; 9/19 at 42-43, 9/24 at 17-21; Ex. 47, 48, 130.

F. Formation of the LLC

Wendy spoke with an attorney, Tracy DiGiovanni, about using an LLC to protect assets from liability. RP 9/19 at 109-110, 131-133. Later,

in March 2003, John Tate formed two LLCs with Greg and Wendy's concurrence: Tate Farms, LLC, which owns the real estate and assets; and Tate Lake, LLC which rents the lake. RP 9/24 at 47-48, Ex. 77. John Tate was the sole manager and member of both LLCs. Ex. 56, 94. He also had Tate & Sons, LLC, which he kept for tax reporting on items bought. Ex. 25. Greg and Wendy then quit claimed their interest in the property to Tate Farms LLCs as a gratuitous transfer. RP 9/24 at 19-20; Ex. 52, 92.

G. Work at the Lake

Greg developed and maintained the property, with his friends helping just so they could go skiing. RP 9/19 at 144, 146, 9/21 at 58, 9/25 at 108, 9/26 at 55. Wendy took care of the kids, cleaned the mobile home, cooked for the family. RP 9/19 at 118. For a few years, Wendy scheduled lake rentals and collected the rent checks, then after 2003, John Tate began handling the deposits and keeping the books. RP 9/18 at 158-159, 9/19 at 105, 116-118, 9/24 at 31, 9/25 at 72, Ex. 132.

By this time, Greg's father was in his 80s, so Greg took actions on his behalf, including signing a document as owner of the property to allow the release of water into the lake. RP 9/25 at 64-71, 9/26 at 16-17, Ex. 63.

H. Breakup of Marriage

Wendy became increasing upset about the amount of time that Greg spent at Tate Lake without financial compensation. CP 292, Ex 1.

Greg thought Wendy was too permissive with the kids and did not support him in his efforts to make them responsible for their chores. RP 9/25 at 90-91, 9/26 at 150, 161. By summer 2011, Wendy had stopped going to Tate Lake, as often, while Greg continued to work on the property and to take the kids there for waterskiing. RP 9/25 at 71-72, 103-104, 178-179.

I. Petition for Protection Order and Separation

On August 11, 2011, Wendy filed a petition for a protection order and obtained a temporary protection order ex parte. CP 350. On August 25, she filed a petition for legal separation and a motion for temporary orders, asking that Greg have no contact with the children. CP 286-295. She alleged he was abusive, gave them "no access to money," left them in a home with "no ceilings or walls or floors downstairs," and even "threw a large ax blade and a beer bottle" at her. CP 288, 294, RP 9/19 at 83. The same day, the parties appeared in ex parte and agreed to temporary restraining orders until a full hearing and that the protection order "shall be dismissed." CP 311.

In response, Greg acknowledged he and Wendy had hostile arguments and accepted a share of the blame for the fact the kids witnessed them. He had already gone for an anger evaluation and met with the children's counselor. He stated he did not abuse his children and certainly did not throw an ax at Wendy, but agreed to restraining orders to

provide a cooling time. He also was adamant that he received no money from Tate Lake; that it was owned by his father's corporation and he was just a shareholder. (9/23/11 Declaration of Gregory Tate.)

Meanwhile, Wendy asked their waterskiing friends to not write statements supporting Greg and promised he could have free access to the kids, even while asking for no contact. RP 9/21 at 33, 9/26 at 54; Ex. 27.

J. Temporary Parenting Plan

In October 2011, James Cathcart was appointed as guardian ad litem. In his initial reports, he stated that the children spoke of ongoing fighting between the parents, with their father verbally attacking their mother, but found it "absolutely inappropriate" that Wendy had been telling them that she was afraid of their dad. Ex. 15 at 6 . As the kids showed no enthusiasm for visiting Greg, he recommended only one day every other weekend, which the court adopted as its temporary parenting plan. Ex 15 at 8, CP 313-320.

K. Trial

In September 2012, Wendy and Greg had a four day trial before Pierce County Superior Court Judge James Orlando to consider whether restraining orders were necessary, whether the parenting plan should be restrictive or 50/50, whether they had an interest in John Tate's LLCs and property, how to divide their property and debts, and whether to award

maintenance and attorney fees.

Prior to trial, Wendy filed an action in King County Superior Court against Greg and his parents to determine ownership of the LLCs and their property. RP 9/18 at 4. Greg asked that the issue of any community interest in property and the enforceability of the promissory note to his father, John Tate, be resolved in the other case. RP 9/18 at 4-16, 135-138, 9/19 4-15. The court ruled that it would only decide whether there was a community interest in the property, not the value of the interest, and that it would not address the promissory note, as John Tate "obviously has the right to protect his interest." RP 9/18 at 137-138, 9/19 at 8, 12.

1. Restraining Order

Wendy sought permanent restraining orders for herself claiming that Greg was emotionally abusive and extremely controlling over money. RP 9/18 at 18, 9/19 at 150-152. She claimed she only had the rent money from the condo that Greg bought before marriage, which was $1,095 per month, plus her income from "working every day at John L. Scott Realty" to pay for household expenses. RP 9/18 at 187-192, 9/19 at 40-41, 99-100, 114-115, 155, 9/25 at 52-53, Ex. 1 at 1. Her mother, Grace, testified Wendy "had no money, no account, no charge accounts, no funds at all." RP 9/18 at 175-177.

Wendy's therapist, Emily Schoenfelder, testified, that based on

Wendy's "extreme anxiety," and her reports that Greg gave her "minimal" money, "no access to any financial information," and shouted at her, she was a victim of domestic violence. RP 9/19 at 18-26.

Greg testified that, in fact, Wendy was irresponsible with her spending; that he worked and paid the mortgage and other expenses and that supporting a family of four on a single income was a struggle. RP 9/25 at 41, 55. He stated that contrary to Wendy's claims, she had open access to their financial and tax documents and when the tax papers came in the mail, she even took them to their accountant. RP 9/25 at 79-81, Ex. 75. Wendy admitted that she did this but claimed that she never looked at them. RP 9/21 at 33-34. Even Mr. Cathcart noted the fact that Wendy had her salary and the condo rent, while Greg covered all other expenses, contradicted what she told him about Greg's controlling with money. RP 9/18 at 114-119, Ex. 1 at 15.

In her trial brief, Wendy alleged that Greg "has thrown an axe at her," but she did not actually testify to this incident. CP 351. This allegation resurfaced because Wendy told the kids that their dad came after her with an ax, which they then told the GAL and Dr. Huddlestone as a reason they thought she was afraid of their dad. RP 9/18 at 49, 122, Ex. 14 at 12. All that happened, Greg explained, was that in 2009, while fixing a broken ax, Wendy could not recall where she had moved the

supplies and, in frustration, he tossed the ax handle and blade on the work table. RP 9/25 at 92.

2. Parenting Plan

Wendy also sought a restrictive parenting plan for the children, broadly claiming that the family "lived in constant fear" of Greg's "emotional abuse and physical violence," when, in fact, she only specified conflicts between Greg and Boone over chores and Greg's dislike of the family dog. CP 350-352.

Greg asked for equal time with the children. RP 9/25 at 142, 150-151, 160-161. He insisted that the children were not afraid of him before Wendy started the case and that he never physically abused Dax or Boone. RP 9/25 at 141, 167-168. He described how involved he was with their sporting events, scouts meetings, vacations, school projects, skiing, and other activities and provided photographs of the activities. RP 9/25 at 131-156. And, he had addressed the allegations by attending six months of weekly domestic violence meetings, with only had two more to go. RP 9/25 at 142-143.

In support, four mutual friends testified that they were with Greg and his family at Tate Lake several times per year and had no concerns about Greg's interactions with his kids. RP 9/24 at 57-61, 68, 9/25 at 103-105, 9/26 at 50-52.

Wendy claimed that Greg physically abused the kids, but she only described incidents that involved Boone. For example, in 2008, Greg and Boone got into a dispute over mowing the lawn and Greg ended up throwing the dog's bed in the fire pit. RP 9/18 at 150, 167, 9/19 at 58-59, 9/25 at 84, 9/26 at 83-84. Around 2009, Boone refused to pick up an ice cube, and as he walked away Greg tossed ice cubes at him without hitting him, as confirmed by Dax and Boone. RP 9/18 at 61, 9/21 at 25-26, 9/25 at 88, Ex. 14 at 11.

Wendy claimed that in 2010, Greg hit Boone in the face while picking up dog poop, but Greg explained that when Boone refused to help and stomped on his foot he had only "lightly slapped his face." RP 9/18 at 46, 9/21 at 25-26, Ex. 14 at 6. She also claimed that in 2008 Greg threw a "large piece of wood debris" at Boone. RP 9/21 at 25-26, 9/25 at 90, Ex 14 at 6. Greg said "he didn't hit him"; he was cutting back a willow tree and sliding piles of branches off the bulkhead onto the beach, while Boone and Dax were jumping on the pile and some "wispy little limbs" might have hit him. RP 9/25 at 90-91. However, Dax told Mr. Cathcart that "he didn't recall Dad hitting Boone at the branch or the dog poop incident." RP 9/19 at 61, Ex. 14 at 10.

Wendy also alleged Greg was abusive to the dog, who she had brought home several years ago even though Greg was extremely allergic

to dogs and did not want one. RP 9/25 at 82. Greg did not like the dog, but he never abused it, as the children confirmed to Mr. Cathcart. RP 9/18 at 65-66; 9/25 at 82-84.

Mr. Cathcart discussed an incident that he said "bothers" him. RP 9/18 at 126-127. Samena told him that she "would be okay with every other weekend overnight visit," and later, Wendy called and put Samena on the phone, who said that she "didn't really want to spend overnights." He asked "Samena did you talk to your brothers or your mother about what you and I discussed, and she said no." He said that he had "problems with that answer." RP 9/18 at 91-92, Ex. 13 at 10-11.

Mr. Cathcart looked into – and dismissed – a number of Wendy's allegations during the case, including abuse of Boone, inappropriate texting to the children, and inappropriate touching of his daughter. RP 9/18 at 59, 75, 92-93, 127-128.

He also dismissed Boone's allegation of abuse because it turned out he was just bored during a visit, but wanted everything to be...evidence of [abuse] but "it wasn't." RP 9/18 at 70-73.

Mr. Cathcart believed that Greg yelled and fought with Wendy frequently before they separated. RP 9/18 at 62-63. However, he stated that the kids acknowledge that dad had changed and had not been violent or frightening since the separation. RP 9/18 at 4, 61. Mr. Cathcart found

no evidence that either Greg or Wendy has a drug or an alcohol problem; no evidence of a detrimental environment in the father's home; and despite the conflict with Wendy, he did not find Greg engaged in abusive use of conflict which creates the danger of serious damage to the child's psychological development. RP 9/18 at 5, Ex. 12 at 5.

He also found that it is "more likely than not there was domestic violence in the Tate family prior to separation — more emotional than physical but no less frightening for that fact." Ex.12 at 6. However, he noted that Greg had a domestic violence evaluation, had only one meeting to complete treatment, and had made "no significant mistakes," during the case and that any incidents reported were relatively minor or overblown. RP 9/18 at 7-8, 79, Ex.12 at 6, 8. He recommended that Greg's residential time remain the same while he and the kids "enter into reconciliation therapy with Dr. Loren McCollom" and that his time "be expanded pursuant to the progress of the reconciliation therapy as determined by Dr. McCollom." RP 9/18 at 80-81, Ex. 12 at 8.

3. Division of Property

Wendy claimed Greg's position was that "most of the parties' assets do not belong to them at all, but to his father." CP 357. She was clearly referring to the eastern Washington property, as the family home at Lake Tapps, a condo, three retirement accounts, a mobile home and

multiple vehicles, boats, and trailers were before the court for division.

a. Tate Lake

Wendy claimed that Greg was attempting to deprive her of the community's interest in the LLCs, which she acquired by paying $500 as earnest money during the buyout of the Bonneys' interest. RP 9/19 at 131, 9/21 at 41, 9/24 at 21, Ex. 2.

Greg contended that he and Wendy didn't own any interest in the land, because he didn't pay for it, even though his name had been on the deed. RP 9/26 at 19. He never told Wendy that she was an owner of Tate Lake or the LLCs. RP 9/25 at 119. Greg explained that he "just misspoke," in a prior declaration, when he said he was a shareholder in his dad's corporation, because he didn't "even know how that whole structure works." RP 9/19 at 131, 9/25 at 78, 9/26 at 115.

Greg's father, John Tate, age 85, testified that because he "paid the full cost," it was his property and that it was a mistake to put Greg and Wendy's names on the deed and also to give Greg K-1s forms as a member of the LLC, because Greg was not a member. RP 9/24 at 21-22, Ex. 51, 54. He explained that the LLCs had eventually earned enough to cover expenses and funds improvements to the lake, but did not provide an income to himself or to Greg, further, he reimbursed Greg for any expenses he incurred related to the lake. RP 9/24 at 7, 25, 9/25 at 62, 77,

Ex. 1, 57, 77, 93, 100, 105, 108.

Greg testified that he and Wendy never filed any of the K-1 forms with their income taxes returns and that they never claimed any income or expenses regarding Tate Lake on their income taxes. RP 9/25 at 62, 64, 78, Ex. 57, 110. He said that his father paid for everything and reimbursed him for his expenses. RP 9/25 at 77-78, 119-126. Greg explained that he opened a P.O. Box in 2009 or 2010 simply to avoid a repeat of the time that Wendy had taken and cashed the tournament entry checks, not as a secret place to receive income. RP 9/25 at 78-79.

b. Lake Tapps Home

Wendy claimed that the family home on Lake Tapps was in "poor condition" with "significant hidden structure, water and electrical issues" and had a negative $20,000 value, even thought her appraiser valued it over $300,000. CP 357-358; RP 9/21 at 13-17, Ex. 115. However, she asked to be awarded the home "so the children may continue to reside in the only home they have known." CP 358.

Greg's appraiser valued the home at $340,000 and did not report it was in poor condition. RP 9/21 at 13-15, Ex. 115. Greg testified he would take the house at the appraised value, as he had done a great deal of remodeling and wasn't aware of the issues Wendy claimed. RP 9/25 at 25-30, Ex. 115. Two mutual friends confirmed that the house looked nice,

with the kitchen remodeled, and the basement not completely finished. RP 9/24 at 55-57; 9/25 at 100-102, 9/26 at 50-51.

c. Lake Sammamish Condo

Wendy asserted the condo that Greg brought before marriage was community property because they paid off its loan with funds from refinancing the mortgage on the family home. RP 9/19 at 106-107. Greg said it was his separate property and that his father paid off the loan. RP 9/25 at 30, 35, Ex. 139.

d. Personal Property and Debts

Wendy and Greg disputed the character and division of a number of vehicles, ski boats, trailers, and a mobile home, as well as two loans against Greg's Boeing VIP. RP 9/19 at 151-153, 9/25 at 11-13, 36-46.

4. Final Orders

On October 5, 2012, the court, in a decision letter, gave its impression of the case: "the saga of Greg and Wendy Tate parallels the use of Tate Lake; two people in a boat on a manmade lake going nowhere...this is a case about power and control, domestic violence and the damage created." CP 381. The court stated it "will adopt the mother's proposed parenting plan," until such time as Mr. Cathcart's recommended reconciliation counseling "has been completed and then Mr. Tate can seek a review hearing for increased residential time." CP 381-382.

The rest of the decision overwhelming favored Wendy. She was awarded 100% of the family home, $91,000 of the value of Greg's condo, the share of personal property that she requested, half of the marital share of his retirement accounts, $2,000 a month in maintenance for 48 months, $20,000 in attorney fees - - and above all - - 100% of the community interest that the court found in John Tate's LLCs and property. CP 382. By contrast, Greg was punished. He sought clarification of this shocking outcome and, in response, three days later, the court added that he "would be estopped from claiming [a community] interest existed [in the LLCs], as he testified to the contrary." CP 384-385.

On October 15, Greg, in a motion for reconsideration, asserted that the court must have improperly considered marital misconduct in making such an excessive and unfair award. CP 75-79, 137-139

On November 9, the court refused to reconsider and entered the findings of fact and conclusions of law, decree of dissolution, parenting plan, the restraining order[1], and the order for child support. CP 140 -157, 173-188. Things went from bad to worse. In the parenting plan, Greg would continue to see his kids just one day every two weeks, based on five RCW 26.09.191 factors, and also on the GAL reports, which it incorporated, but instead of Mr. Cathcart's recommendation that Dr.

[1] The restraining order was amended on December 21, 2012, to change its duration from permanent to ten years.

McCollum assess the progress of the counseling, inserted: "Upon Dr. Huddlestone's belief that counseling has been completed, the father can seek a review hearing for increased time." CP 156.

In addition, the court also found that action upon the promissory to John Tate was barred by the statute of limitations. CP 179, 187.

Further, the court, sua sponte, issued an order for protection, without notice, that allowed Wendy to "request modification of visitation" if he failed to comply with treatment or counseling. CP 141-145.

In desperation, Greg renewed his arguments in a second motion for reconsideration on November 16th hoping that the court would appoint Dr. McCollum instead of Dr. Huddleston, as the GAL recommended. CP 189-193, 212-214. It was denied. CP 222.

L. Post-Trial Decisions on QDRO

Wendy prepared a proposed QDRO for Greg's VIP which elected the 100% joint and survivor annuity option. CP 226-228. Greg objected that it was not what the court ordered and it would reduce his monthly retirement benefit. RP 1/11 at 1-6; CP 226-238. But, again, the court disagreed, denied his motion, and ruled that Wendy was entitled to the survivor benefit, because she "has no other assets" and entered both QDROs on December 21, 2012. RP 1/11 at 7, CP 249-257, 449-450.

Greg appeals. CP 392-446, 453-484.

IV. ARGUMENT

A. Standard of Review

This court reviews whether substantial evidence supports the trial court's findings of fact and, if so, whether those findings support the trial court's legal conclusions. Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). Conclusions of law are reviewed de novo. Marriage of Herridge, 169 Wn. App. 290, 297, 279 P.3d 956 (2012).

B. Order for Protection

1. Protection order is not supported by findings or evidence.

The trial court, sua sponte, issued an extensive order for protection restraining Greg from causing physical harm, bodily injury, assault, sexual assault, molesting, harassing, threatening, stalking, coming near, or contacting Wendy, concluding that he "committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner." CP 141-145, 178, 381. However, the court failed to make findings that Greg engaged in acts defined as domestic violence under RCW 26.50.010:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

In addition, the record does not support a finding that Greg physically harmed or inflicted fear of imminent harm on Wendy. Only Wendy's disputed claim that Greg "threw an ax" at her could meet the statutory definition of domestic violence. But she did not testify about it at trial and neither the court nor the GAL made findings about it.

Wendy first told the story of the ax in August 2011 when she sought a temporary protection order and then she told it to children, who repeated it to the GAL, as a reason she feared their father. RP 9/18 at 49. She had not told any of her friends, family, or therapist who testified on her behalf as they did not mention the incident.

In any event, the ax incident in 2009 was an isolated incident, remote in time. The term "history of domestic violence" was intended to exclude isolated, de minimus incidents which could technically be defined as domestic violence. Marriage of C.M.C., 87 Wn. App. 84, 88, 940 P.2d 669 (1997).

Otherwise, Wendy alleged that Greg was abusive through financial control and expressions of anger, which may have inflicted fear but not fear of imminent physical harm, as required by the statute. Such acts do not represent a credible threat to Wendy's physical safety. The imposition of the protection order without findings or substantial evidence of act of the statutory definition of domestic violence requires reversal.

2. Protection order cannot modify the parenting plan

The order for protection improperly provided that Wendy "may request modification of visitation if respondent fails to comply with treatment or counseling as ordered by the court." CP 144. A court may not allow a protection order to serve as a de facto modification of a parenting plan. Marriage of Watson, 132 Wn. App. 222, 234-235, 130 P.3d 915 (2006)(citing Marriage of Barone, 100 Wn. App. 241, 247, 996 P.2d 654 (2000)(noting the legislature intentionally made it easy to obtain a protection order but difficult to modify a parenting plan; a parent may not take advantage of the former to evade the latter).

Here, the protection order does exactly that. It allows Wendy a way to modify the residential schedule reducing Greg's time, without following RCW 26.09.260. This provision must be reversed.

C. Restraining Orders are Unnecessary

The court imposed extensive restraining orders against Greg, based on its unsupported conclusion that he "represents a credible threat to the physical safety of the protected party." CP 177. A trial court is authorized to "make provision for any necessary continuing restraining orders," in entering a decree of dissolution of marriage. RCW 26.09.060. The purpose of an injunction is not to punish wrongdoer for past transactions but to restrain threatened or future wrongful act. Lewis Pacific Dairymen's

Ass'n v. Turner, 50 Wn.2d 762, 314 P.2d 625 (1957).

The restraints were not necessary to prevent Greg from any threatened or future wrongful act, as the alleged conduct ceased. In addition, the conclusion that Greg "represents a credible threat" is not supported by findings of threatening conduct or substantial evidence supporting such findings, as shown in the analysis of the protection order. On the contrary, the court, by adopting the GAL's reports, made findings that support the opposite conclusion, that as of the time of trial, Greg had, in fact, turned a "new leaf." Ex. 12 at 7-8. The unsupported restraining orders serve only to punish him and should be reversed.

D. Parenting Plan

The court concluded "Mr. Cathcart's recommendation of reconciliation counseling is appropriate," incorporated his reports as its findings, but adopted Wendy's proposed parenting plan "until such time as the counseling has been completed and then Mr. Tate can seek a review hearing for increased residential time." CP 381-382. This was an error.

Because Mr. Cathcart's goal was a "reasonable parenting plan with substantial – with both parents," he recommended an interim residential schedule where Greg's time could flexibly "be expanded pursuant to the progress of the reconciliation therapy as determined by Dr. McCollum." RP 9/18 at 80-81; Ex. 12 at 8-9.

Wendy, however, appointed Dr. Huddlestone, who "requires the parents to pledge not to involve her in custody litigation," (as she testified by declaration in June 2012), as the gatekeeper to request increased time:

> Upon Dr. Huddlestone's belief that the counseling has been completed, father can seek a review hearing for increased residential time. CP 156, 342, RP 9/25 at 163.

After trial, Greg twice asked the court to use the GAL's process for expanding his time. CP 213. He pointed out that Dr. Huddlestone would never state her belief, thereby blocking him from a hearing as she required the parents to pledge to "neither request nor require that Dr. Huddlestone provide testimony in court either as an advocate or as an impartial." CP 213. Both requests were denied. CP 140, 222.

The trial court may not delegate its statutory authority to permanently determine a parent's residential schedule without the right of court review, as shown in Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 801, 929 P.2d 1204 (1997). In that case, the trial court appointed a mental health counselor as the arbitrator, authorized to make "alterations and additions" to the parenting plan, while providing the parents the right to seek review of these decisions by the court. Kirshenbaum, 84 Wn. App. at 801. After the arbitrator temporarily suspended the mother's visitation a number of times, the trial court confirmed this decision and the mother appealed. Kirshenbaum, 84 Wn. App. at 802-803. The appellate court

explained that that although a trial court "may not abdicate its ultimate authority to modify parenting plans," it "may vest an arbitrator with authority to suspend visitation as long as the parties have the right of court review." Kirshenbaum, 84 Wn. App. at 804, 807.

Here, the court's delegation was undoubtedly outside of the permissible limits, as it made the intended interim residential schedule permanent by Dr. Huddlestone's refusal, in advance, to make the decision that she was appointed to make, which is a precondition for Greg to "seek a review hearing for increased time." CP 156. The court's delegation of its authority was an abuse of discretion which must be reversed.

E. Findings Do Not Support RCW 26.09.191 Factors

The trial court, in its parenting plan, blanketed Greg with five limiting factors under RCW 26.09.191(1), (2) and (3), thereby restricting his visits and his decision making rights, based on conflicting and unsupported findings. CP 150-157.

1. RCW 26.09.191(3)

Under RCW 26.09.191(3), the court concluded there was "neglect or substantial nonperformance of parenting functions," "absence or substantial impairment of emotional ties between the parent and children, and "abusive use of conflict by the parent which creates the danger of serious damage to the children's psychological development." CP 151-

157 However, the findings, consisting of the GAL reports, do not support these factors. Most glaringly, the conclusion that Greg engaged in "abusive use of conflict" is a manifest abuse of discretion, because Mr. Cathcart specifically found that he had not. Ex 12 at 5.

Mr. Cathcart did not find that Greg failed to perform parenting functions. Wendy alleged that Greg abandoned and neglected the family every weekend from March to October, but their mutual friends testified that, in fact, the kids were there with him at these times and Greg testified about his involvement in the kids' daily lives and activities.

Mr. Cathcart also did not find that Greg had substantially impaired emotional ties with his kids, or that he caused the strained relationship that existed after separation. A finding under RCW 26.09.191(3) must be supported by substantial evidence that the parent's "involvement or conduct" caused the restricting factor. Watson, 132 Wn. App. at 233.

Mr. Cathcart noted that the kids were not enthusiastic about visits with their father, but concluded "I can't attribute any of this to Greg Tate's actions or behavior – at least during the 10 months." Ex. 13 at 11. He also noted that Samena said she "is OK with her dad and enjoys being there," and Dax said that his relationship with his dad was "generally good." Ex. 13 at 9-10. Dax just said that his dad and Boone "were always at odds," as he "would refuse to do the tasks that he thought were unreasonable." Ex.

13 at 9. These findings, adopted by the court, do not support the factor of "substantial impairment of emotional ties." The unsupported RCW 26.09.191(3) factors should be reversed.

2. RCW 26.09.191(1),(2)

Under RCW 26.09.191(1), (2), the court concluded there was a "physical or a pattern of emotional abuse of the children" and a "history of acts of domestic violence." CP 151. But, the findings do not show that Greg physically harmed the kids or inflicted fear of imminent harm on them as required by RCW 26.50.010. Mr. Cathcart concluded that the domestic violence was "more emotional than physical," with the emotional part based on the kids' report to him of "constant furious arguments" between their parents and the physical based on their reports to Dr. Huddlestone of "being inappropriately hit by their father." Ex. 12 at 5-6. However, substantial evidence does not support the finding that Greg "inappropriately hit" the kids. All of Wendy's specific allegations of physical abuse involved only Boone, and were at most "unreasonable disciplinary demands" not physical abuse or statutory domestic violence. Ex. 14 at 14. Greg addressed these concerns in domestic violence treatment and the GAL concluded that the kids "admit that he has not been violent or frightened them" after the separation. Ex. 12 at 7.

The findings also do not support "a pattern of emotional abuse of

the children." CP 157. The court's only finding of "emotional abuse" was that Greg used "the dog and dog bed as a means to control Wendy and the children." CP 381. However, Greg's dislike of the dog does not constitute "emotional abuse," since the children agreed that Greg was not abusive to the dog, and the incident over the dog bed was a conflict with Boone over chores. RP 9/18 at 65-66, 9/26 at 83-84. The GAL's findings focused on the conflicts between the parents with "Greg yelling and screaming at Wendy," which was the consistent concern reported by the children. Ex. 12 at 6. This may have been a pattern of behavior toward Wendy, but not toward the kids themselves, who were afraid as bystanders. The fact that the behavior stopped after separation shows it was not directed at the kids. Accordingly, the Court should also reverse this finding and remand for a parenting plan based on RCW 26.09.187(3)(a).

F. Property and Liabilities

1. Introduction

Per RCW 26.09.080, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors. While the trial court is not required to divide community property equally, if its dissolution decree results in a patent disparity in the parties' economic circumstances, the appellate court

will reverse its decision as a manifest abuse of discretion. Urbana v. Urbana, 147 Wn. App. 1, 10, 195 P.3d 959 (2008). Here, reversal is required as the court considered marital misconduct, divided the property of a third party, and made an inequitable distribution of property.

2. No authority to determine rights of John Tate

a. Promissory Note. The court lacked the authority to decide that action on the promissory note to John Tate, "who is not a party to this action" was barred by the statute of limitations. CP 179, 384-385. In a dissolution proceeding the superior court "has jurisdiction only over the parties to the action. It may not adjudicate the rights of third parties who have an interest in any of the property at issue." Marriage of Soriano, 44 Wn. App. 420-421, 722 P.2d 132 (1986) (dissolution court lacked the authority to determine the substantive rights of the bank, a third party creditor, by ordering the surrender of husband's stocks).

Here, the court abused its discretion, recognizing at the start of trial that it that lacked jurisdiction over John Tate, yet, in the final orders, ruling that any action on the promissory note to him was barred by the statute of limitations, leaving Greg the burden of repayment an additional debt. CP 179, 185; RP 9/18 at 6, 137-138, 9/19 at 8, 12. This ruling must be reversed.

b. LLCs and real property owned by John Tate. Similarly, the

court found that John Tate "is not a party," and, nonetheless, determined his rights to his property by finding that "the community has held an interest" in the LLCs and awarding "all interest that either party holds" in the entities to Wendy. CP 179, 183-184, 382. As RCW 26.09.080 "only provides for division of property as between the spouses," the court's division of some portion of John Tate's property rights with Wendy requires reversal. Soriano, 44 Wn. App. at 422.

c. The conclusion that "the community has acquired an interest" in John Tate's LLCs is untenable. The court's decision that "the community has acquired an interest" in John Tate's LLCs and property is not supported by its findings that Greg and Wendy worked on the property and that John Tate intended to form a partnership with them and treated them as partners. CP 175, 179, 382

d. Greg and Wendy could not acquire an interest through labor alone. The court found:

> It is clear that Greg and Wendy spent countless hours working to improve, promote and maintain the Tate Lake properties. Greg spent 3-4 days a week there for close to six months of the year. He had his friends assist in building improvements, including concrete walks, laying sod and installing sprinkler systems. Wendy created flyers and a website for the lake. Tate Lake was a priority for this couple, much to the detriment of their marriage, their children and their marriage. CP 382

The findings describe the spouses' labor on the property and in the

rental of the lake, but does not show any means of acquiring a property interest of any kind in John Tate's property. If anything, their labor only shows that they were following through with their commitment which was outlined in John Tate's 1999 letter that stated John Tate had provided all the funds to purchase the property and Greg and Wendy agreed to care for the property in exchange for its use. Ex. 107. This finding alone does not support a conclusion that the spouses acquired a community interest in John Tate's property.

e. The intent to form a partnership does not confer a community interest in partnership assets. The court found:

> While John Tate is not a party to this action, his inconsistent statements and behaviors over the years support a finding of a community interest. Exhibits 49 and 50 are documents he created that show his intent in forming a partnership with Greg and Wendy and other documents show that he treated them as partners or shareholders of the LLC. CP 179, 382.

Even if John Tate intended to form a partnership with Greg and Wendy and treated them as partners, they would, at most, acquire an interest in the partnership, but not necessarily the assets that the partnership or the LLCs hold. The court conflated interest in a partnership with the property owned by the partnership, which was purchased by John Tate. The finding does not support the conclusion that John Tate transferred an interest in his property to Greg and Wendy.

Substantial evidence does not support a finding that John Tate intended to transfer the LLC's assets to Greg and Wendy. The court cited Ex. 49 as evidence that John Tate intended to form a partnership with the spouses. CP 382. In that document, John Tate described options for forming legal entities but left open the question of assets they hold. Ex. 49. The court similarly cites Exhibit 50, whatever estate planning John Tate was considering, Greg and Wendy did not file the K-1 forms with their income tax returns or treat his property as theirs in any way. Ex. 57, 110.

In Estate of Kruse, 19 Wn. App. 242, 574 P.2d 744 (1978), the court of appeals, in affirming a trial court's decision that a parcel bought by a married couple before the husband formed a partnership with his brother, then, pledged as security for a partnership debt, was a "community asset" of the then-deceased husband and his wife, set out the following factors to consider in determining when an individual's property, purchased prior to forming a partnership, "may still be deemed to have become an asset of the partnership through the intention of the parties as manifested by their acts and conduct toward the land:"

> (1) the use of property in the partnership business, (2) improvements on the property made with partnership funds, (3) treatment of the property as a partnership asset in the firm's accounts, (4) payments of claims against the property by the partnership, (5) conveying or mortgaging it as a partnership asset, and (6) receipt of income from the property as partnership income. Kruse, 19 Wn. App. at 242.

The trial court's decision that the parcel was a community asset, not a partnership asset, was supported by evidence that the partnership, in using the parcel, cleared sagebrush, placed surveying stakes, installed an irrigation system, and seeded half the parcel; used its funds to make only a single payment to the county for water and taxes, made only minor improvements; did not indicate the parcel's status in its accounts; and did not receive any partnership income from the parcel. Id.

Unlike in Kruse, there was no partnership business. The agreement was that Greg and Wendy would use the property for recreation in exchange for upkeep, improvements and rental of the property in order that John Tate could recoup his investment. Ex. 107. The property as not treated as an asset of the partnership. There was no receipt of partnership income from the property and there were no partnership funds available to pay for improvements or claims. John Tate used all income and to fund repairs and improvements. RP 9/24 at 7, 25, 9/25 at 62, 77. This does not show an intent to use the property for a partnership purpose, but rather that John Tate treated both the property, as well as the income from it, as his own. The findings do not support the conclusion that he intended to convey an interest in any partnership or LLC asset.

Accordingly, the unsupported conclusion that the community acquired an interest in the LLC and its assets should be reversed.

f. Wendy did not provide funds to buy out the Bonneys. At trial, Wendy claimed that she paid $500 as earnest money toward the purchase of the Bonneys' interest and, therefore, acquired a community interest through the source of the funds used. RP 9/19 at 131. However, the source of the entire purchase price, even the $500 in earnest money, was John Tate, as shown by a copy of his check reimbursing her for this amount. RP 9/19 at 131, 9/21 at 42, Ex. 47, 96, 206.

Property acquired during marriage has the same character as the funds used to buy it. Marriage of Skarbek, 100 Wn. App. 444, 445, 997 P.2d 447 (2000). As John Tate bought the property while married, the property was presumably John and Maxine's community property. The fact that Greg and Wendy's names were placed on the title when John bought the Bonneys' interest in the property does not give them a community interest in John and Maxine's property. Property is not characterized by the title under which it is held. Id. at 448.

3. Property Award Based on Marital Misconduct

In its decision letter, the court clearly linked "power and control, domestic violence" with the "use of Tate Lake," thereby revealing that it improperly considered marital misconduct in its property award. This explains its punitive decision that Greg "is estopped from asserting any interest" in the LLCs and their property just because he "claims the

parties' have no community interest" in the LLCs and its extremely disparate award to Wendy of 100% of the "interest that either party holds," of an indeterminate value. As a result, if in the pending litigation the court decided that Greg or the community have an interest of any kind, all interest is awarded to her. CP 175, 183-184, 188, 382.

In Urbana v. Urbana, 147 Wn. App. 1, 9-15, 195 P.3d 959 (2008), the court of appeals reversed the trial court's unexplained award of community property 80/20 in the wife's favor, because, in part, its comment that the husband was incarcerated for molesting the wife's daughters from a prior marriage suggested that it improperly considered his marital misconduct, even though it "framed its findings in terms of the post-economic circumstances of the parties." The court clarified that marital misconduct which a court may not consider under RCW 26.09.080 "refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, the deliberate and unnecessary incurring of tax liabilities." Id. at 40.

In Urbana, the court's mere comment on the husband's misconduct warranted reversal of its unexplained 80/20 property award, but here this only explanation for the court's extreme award of property to Wendy and deprivation of Greg's rights. CP 381. The property award must be

reversed.

Wendy compared Greg to the husband in Marriage of Wallace, 111 Wn. App. 697, 45 P.3d 1131 (2002), alleging that he engaged in the waste and concealment of assets. CP 364. But the court did not make findings to this effect and the record does not reflect that Greg engaged in financial improprieties related to the property. He merely took the position that his father owned the property, because he purchased it and paid for all of its improvement, which is quite unlike the brazen attempt by the husband in Wallace to place marital property beyond the reach of the court during the dissolution proceedings.

In Wallace, the court of appeals upheld the trial court's award of 100% of marital real property to the wife at zero value, based on the husband's position that the property belonged to his father and was indivisible by the court, even though he fraudulently transferred the property while the case was pending, noting that the trial court had only considered the husband's waste and concealment of assets, not any immoral or physically abusive conduct. Id. at 702.

By contrast, Greg's position was perfectly proper. He believed that his father owned the property because he bought and funded its development with his own money, while he and Wendy benefitted by unlimited waterskiing on a private lake in exchange for developing and

renting the lake, so his father could recoup his investment. The arrangement, that John Tate bought the property as his own in order to fund his son's hobby, not to generate partnership profits, is shown by his estimate, when he was about 75 years old that it would take about 16 years to recoup his principle investment alone. Ex. 107. Greg was entitled to take a good faith position and the court, punishing him, just because it disagreed, abused its discretion.

4. Mischaracterization of Property

The court also mischaracterized Greg's separate property as community, awarded Wendy 100% of the family home, and inequitably burdened him with repaying marital debts.

Failure to properly characterize the property may be reversible error. Marriage of Chumbley, 150 Wn.2d 1, 4, 74, P.3d 129 (2003). However, mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the distribution is fair and equitable. Id. Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization. Id. A trial court's characterization of property as community or separate is reviewed de

novo. Id.

Here, the distribution was patently inequitable. The court's property award was significantly influenced by its mischaracterization, because it generally awarded each party their separate property and equally divided the significant community assets, except for the family home. CP 152-153, 175. Following this pattern, if the court had properly characterized the condo, certain personal property and loans, Greg would have received a more equitable share of the assets.

5. Lake Sammamish Condominium

The court found that Greg "owned a condo prior to marriage," yet characterized the community contributions to the loan payoff, plus 100% of appreciation as community property, and awarded Wendy $91,000 of this amount:

> Mr. Tate owned a condominium prior to marriage. At the time of marriage it was worth $80,000 with a mortgage of $80,000. I find that John Tate paid of $32,000 of the debt of $80,000 and the community paid the rest through a refinance of the primary residence and the community interest is $182,000. The condo is valued at $214,000 and $32,000 is Greg's separate property. Wendy should have a lien for one-half of the community interest, $91,000, secured by a deed of trust.

CP 175, 184, 382.

This was an error. The court's finding that Greg owned the condo "prior to marriage" supports the conclusion that the condo is his separate

property. The character of property as separate or community is established at the point of acquisition. Skarbek, 100 Wn. App. at 447. Separate property is property acquired before marriage or acquired after marriage by gift, bequest, devise, or descent. RCW 26.16.010, .020; Id.

The character of the funds used to pay the mortgage would not change the separate character of the condo. Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary. Id.

Wendy had the burden of providing by clear and convincing evidence that Greg intended to transfer the condo to the community. Id. at 448. She merely claimed that the community contributed $48,000 toward the $80,000 mortgage balance but, even if this occurred, it did not change its separate character. Property acquired through contractual obligation is acquired and its status determined as of the date the obligation becomes binding, not as of when the money is the paid. Estate of Dougherty, 27 Wn.2d 11, 18, 176 P.2d 335, 339 (1947). Wendy offered no evidence that Greg intended to convey his condo to the community.

In addition, no equitable reason exists to reimburse the community for any funds contributed to the condo's loan because throughout the marriage, Greg gave his separate property rent payments to Wendy to use

for the community's benefit.

6. Personal Property

The court mischaracterized the 2000 Correct Craft ski boat, the 2000 Nautique DHM boat trailer, and the 1998 Liberty mobile home, which Greg purchased during the marriage, as community property and awarded them to Wendy. CP 176. Property acquired during the marriage has the same character as the funds used to buy it. Skarbek, 100 Wn. App. at 447. The presumption is that it is community property. And the party asserting otherwise has the burden of proving it was acquired with separate funds. Id.

Greg rebutted this presumption by testifying that, as a member of the Ski Nautique Promotional Team, he received a new boat before marriage in 1996, which he traded up every year until he acquired the 2000 Correct Craft ski boat and the 2000 Nautique DHM boat trailer. RP 9/25 at 35-37. Similarly he rebutted the presumption by testifying that he bought the 1998 Liberty Mobile Home during the marriage with the proceeds of the sale of a parcel at Lake Sammamish that he owned before marriage, and provided documentation of the purchase. RP 9/25 at 30. However, he pointed out that Wendy had the complete documentation of how those proceeds were used and, after obtaining the protection order, she refused to share them with him. RP 9/25 at 46-47. These assets should

have been characterized as Greg's separate property and awarded to him.

7. Boeing VIP Loans

The court ordered Greg to pay back two loans from his Boeing VIP without characterizing the liability. CP 185. Greg testified that he took the first loan in 2010, with Wendy's knowledge, to pay off the balance owing on an Edge 24-foot travel trailer. RP 9/25 at 11-13, 40-43. He proposed that whoever got the trailer should also take the loan and Wendy agreed. RP 9/25 at 40-43, 9/26 at 112-113.

Greg testified that he alone took the second loan in 2011, one the day before Wendy had him served with the protection order, in order to pay off the first loan and to make late mortgage payments. RP 9/25 at 12-13, 40-42, 9/26 at 113. He hired an attorney with $7,500 as a retainer and gave the remainder to Wendy's attorney, as ordered. RP 9/25 at 40-42.

As both loans were taken during the marriage, they are community liabilities. RCW 26.16.030. There is a presumption that money borrowed by one spouse is for the benefit of the community. But the presumption of community benefit may be rebutted by evidence that the funds were devoted, without the other spouse's knowledge, to a purpose that did not benefit the community. Id.

The loans were clearly community liabilities. The fact that the funds from the second loan were ultimately divided (in Wendy's favor)

and spent on their attorney fees does not change the fact that Greg took the loan to benefit the community by paying community financial obligations. Wendy did not attempt to rebut the presumption.

It is inequitable that Greg was burdened with both loans, while Wendy received the Edge travel trailer purchased with one loan and paid her attorney fees with the other. Accordingly, the allocation of the loans to Greg should be reversed for equitable distribution.

8. Statutory factors not considered in maintenance

The court, in awarding maintenance of $2,000 per month for 48 months, failed to consider Wendy's ability to meet her needs based on her work experience and the property awarded to her, as well as Greg's monthly financial obligations. CP 177, 186.

A trial court abuses its discretion when it does not base its award upon a fair consideration of the statutory factors set forth in RCW 26.09.090. Marriage of Marzetta, 129 Wn. App. 607, 624, 120 P.3d 75 (2005). The maintenance award must be just and the parties' respective economic positions following dissolution must be considered. Id. at 607.

The court's findings that Wendy was a just "stay-at-home mother," who suspended her "outside employment and career efforts" resulting in "decreased earning potential," are not supported by substantial evidence, because, in fact, she had the education and work experience to obtain

appropriate employment.

It was undisputed that Wendy earned a college degree, had years of experience in boat sales and as a para-educator. Ex. 20. Until the separation, she had been working in real estate for her mother and previously held a real estate license. Ex. 20.

In addition, the court found that "Greg and Wendy spent countless hours working to improve, promote, and maintain the Tate Lake properties," which was based on her testimony that she was operating the business of renting the water ski lake. CP 382.

This finding, along with the undisputed evidence shows that Wendy had the work experience to support herself but, instead of doing so, chose to start graduate school to begin a new career. RP 9/19 at 181-184. The purpose of maintenance is to provide support until a presently dependent spouse is able to become self-supporting. Marriage of Irwin, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). By contrast, the court found that Greg "has the ability to provide financial support," based on a monthly net income of $6,783, but failed to consider his monthly expenses of $3,572, $1,627 in child support, and 62% of child expenses, leaving him insufficient funds after paying maintenance. CP 177, 382.

The unsupported and conflicting findings do not support the award, and, instead, reveal that it is not just and should be reversed.

9. The award of attorney fees should be reversed

The court ordered Greg to pay $20,000 of Wendy's attorney fees based on his unsuccessful motion to revise an order of contempt, the parties' economic positions after dissolution, and on his intransigence, finding that he had been "significantly more intransigent." CP 178, 383. The award was not proper for either reason.

The court's award of fees is reviewed for an abuse of discretion. Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). The court must enter findings of fact and conclusions of law to support a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

a. Greg does not have the ability to pay.

The court may, "after considering the financial resources of both parties," order one party to pay the other's attorney fees. RCW 26.09.140. The trial court must balance the needs of the spouse requesting fees against the other spouse's ability to pay. Marriage of Morrow, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

This the court failed to do. Greg was awarded much less than 50% of the parties' assets, and after paying support, maintenance and 62% of other expenses, does not have enough to pay his own expenses while contributing to Wendy's fees. The court abused its discretion in awarding fees under RCW 26.09.140 and should be reversed.

b. Greg was not intransigent.

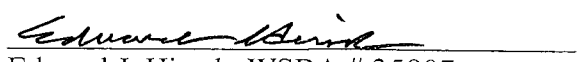
A trial court may award fees based on the intransigence of a party, without regard to the parties' financial resources. Marriage of Crosetto, 82 Wn. App. at 564, 918 P.2d 954. Intransigence is reserved for cases involving conduct beyond the pale, such as extreme acts of frivolous obstructionism or outright maliciousness.

For example, intransigence was found when the husband's recalcitrant, foot-dragging, obstructionist attitude increased the cost of litigation to his former wife in Eide v. Eide, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). Intransigence was also justified by the failure to provide financial information; fraudulent transfer of property and waste of community assets. Wallace, 111 Wn. App. at 702-703.

Here, the trial court did not enter any findings specifying what conduct of Greg's was intransigent. Wendy contended, in her trial brief, that Greg had committed "waste or concealment of assets" and failed to approach case with "good faith and cooperation". However, a defense or refusal to settle on her terms does not constitute intransigence.

The award of fees should be reversed.

Respectfully submitted this 23rd day of August, 2013.



Edward J. Hirsch, WSBA # 35807
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 26, 2013, I arranged for service of the foregoing Opening Brief of Appellant on the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA	___ Facsimile _X_ Messenger ___ Overnight Mail ___ Hand Delivered
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8th Avenue North Seattle, WA 98109	___ Facsimile ___ Messenger _X_ Overnight Mail ___ Hand Delivered
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DATED at Seattle, Washington this 26th day of August, 2013.

Edward J. Hirsch WSBA# 35807

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